Supreme Court of the United States

OCTOBER TERM, 1951.

No. 15, MISCELLANEOUS.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY, STATES MARINE CORPORATION, *et al.*,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent,

and

FEDERAL MARITIME BOARD,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR THE PETITIONER, ISTHMIAN STEAMSHIP COMPANY.

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Opinion Below.

The opinion of the District Court (R. 97-104) is reported at 94 Fed. Sup. 900.

Jurisdiction.

The judgment of the District Court was entered on March 7, 1951 (R. 104-105). The motion for leave to file petition for writ of certiorari under section 1651(a) of Title 28, U. S. Code (formerly Section 262, Judicial Code, 28 U. S. C., Section 377) was filed on June 2, 1951, to which

was annexed the petition for such writ of certiorari. Order granting motion for leave to file petition for writ of certiorari was made and entered on October 8, 1951 (R. 105). The jurisdiction of this Court to review the order and judgment, review of which is sought, is sustained by *United States Alkali Export Assn.* vs. *United States*, 325 U. S. 196; *De Beers Consolidated Mines* vs. *United States*, 325 U. S. 212.

Questions Presented.

1. Whether the United States Maritime Commission, now the Federal Maritime Board, is vested with exclusive primary jurisdiction to determine the lawfulness or unlawfulness of the conduct charged in the complaint.

2. Whether the approval by the Shipping Board and the Maritime Commission of the defendant's conference agreement and amendments thereof pursuant to the provisions of Section 15 of the Shipping Act of 1916, as amended (46 U. S. C., §814) exempts the defendants from prosecution under the Sherman Act with respect to the conduct charged in the complaint.

Statutes Involved.

The statutes involved are Sections 1, 2 and 4 of the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies, as amended," commonly known as the "Sherman Antitrust Act", and an Act of Congress of September 7, 1916, entitled "An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a

naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes," and the amendments thereof, commonly known as the "Shipping Act of 1916," 46 U. S. C. §801 *et seq.* The pertinent provisions of the Sherman Act and the Shipping Act are set forth in the appendix hereto attached.

Statement.

The complaint (R. 1-21) in this cause alleges that the defendant, Far East Conference is a voluntary association and organization of steamship lines; that the other defendants are engaged as common carriers by water in the transportation of property in the foreign trade from the Atlantic Coast and Gulf ports of the United States to the ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands designated in the complaint and herein as the "Outbound Far East Trade". Such carrier defendants are members of the defendant, Far East Conference, under an agreement known as "United States Maritime Commission Conference Agreement No. 17" approved November 14, 1922, under the provisions of Section 15 of the Shipping Act as amended. A true copy of said agreement, as amended to December 4, 1947, is attached to the complaint as Exhibit A (R. 8-16).

The complaint further alleges that the membership of Far East Conference includes all but one of the common carrier shipping lines regularly engaged in the Far East trade and that the members of the Far East Conference carry virtually all the commercial tonnage transported by shipping lines engaged in that trade (R. 4, 5).

Paragraph 31 of the complaint charges that the defendants are engaged in an unlawful conspiracy in restraint of trade and commerce of the United States with foreign nations to monopolize and that they have monopolized such trade and commerce in violation of Section 2 of the Sherman Antitrust Act (R. 5).

Paragraph 32 states that the alleged unlawful conspiracy consists of concerted action by the carrier defendants in establishing and maintaining a system of "contract" rates and higher "non contract" rates, the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade. A copy of the Agreement pursuant to which contract rates are charged is annexed to the complaint (R. 16-20).

As above stated, the Conference Agreement (R. 8-16) and all of its amendments have been approved by the administrative agency charged with the duty of enforcing the Shipping Act of 1916 (R. 5 and 11).[1]

Paragraphs 8 and 9 of the Conference Agreement (R. 10 and 11) provide as follows:

> "8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at

[1] Note: The administrative agency is now the Federal Maritime Board. It was formerly the United States Maritime Commission and prior to that the Shipping Board administered the Act. In this brief the agency will be called the "Maritime Board" throughout regardless of the Agency which was acting at the time.

not later than 4 P. M. of the day prior to the date of meeting; and the Chairman shall cause such notice to be given on the request of any party hereto made in writing to the Chairman not later than 11:00 A. M. of the day prior to the date of meeting. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any matter or thing brought before the meeting in the manner aforesaid and agreed to by a majority of the parties hereto, shall thereby become an agreement binding upon all of the parties hereto, with the same force and effect as if expressly made a part of this agreement.

"9. Pursuant to recommendations made by the Chairman, or pursuant to the recommendation of any Committee or Sub-Committee authorized by a majority vote of the parties (fol. 16) hereto and appointed as provided in Article 7 hereof, or without any recommendation, the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof."

Paragraph 24 thereof (R. 16) provides that any person, firm or corporation may hereafter become a party to the Agreement by the consent of a majority of the parties thereto by executing the Agreement and making the deposit required by Article 10 thereof.

The contract rate agreement with shippers (Exhibit B to the complaint R. 16-20) provides in paragraph 1 thereof

that the shipper in consideration of the rates and other conditions stated in the Agreement agrees to forward by members of the Far East Conference all shipments made directly or indirectly by agents, subsidiaries, associated and/or parent companies and shipped from United States ports, excepting Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and Philippine Islands. A supplement to the contract states the commodities involved and the rates and conditions of the contract (R. 20).

Under Paragraph 3 (R. 18) the shipper has the option of selecting any of the vessels operated by any of the members of the Far East Conference provided that required space to port of destination is available.

Paragraph 2 of the Agreement provides that in the event of an increase in rates the shippers shall be given written notice thereof not less than thirty days in advance of the increase and within ten days from the receipt of the notice the shipper may cancel the contract as of the effective date of the increased rate or rates, subject to the option of the carriers either to accept cancellation or to continue the contract under the rates in effect at the time notice of increase was given.

Section 15 of the Shipping Act of 1916 (46 U. S. C. §814), as amended, provides as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommoda-

tions; or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016."

Motions were made by the defendants to dismiss the complaint on the ground that the Maritime Board had exclusive primary jurisdiction of the charges alleged in the complaint and also upon the ground that the complaint failed to state a claim upon which relief can be granted (R. 72 and 74). The Maritime Board which was permitted to intervene as a defendant by the Court made a motion to dismiss the complaint on the same grounds (R. 94 and 95). These motions were denied (R. 104).

Summary of Argument.

The Shipping Act regulates the business of common carriers by water in a manner which is different from and inconsistent with the provisions of the Sherman Act and vests in the Maritime Board the power and the duty not only to approve or disapprove Conference agreements among carriers by water, but also to police what is done under such agreements and to cancel its approval thereof if, in its judgment, what is done involves conduct which is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act.

It appears from the complaint that the Conference Agreement and all of its amendments were filed with the

Maritime Board, as required by Section 15 of the Shipping Act, and that such Agreement and all of its amendments were duly approved by the Maritime Board. The Conference Agreement and the acts done thereunder within its purview are exempted from the provisions of the Sherman Antitrust Act. The "contract non-contract" rates which are the basis of the complaint were fixed by the Conference pursuant to the Conference Agreement which provides that the members of the Conference may agree upon rates and adhere to the rates upon which they agree (R. 11).

ARGUMENT.

I.

The Federal Maritime Board is vested with exclusive primary jurisdiction to determine the lawfulness or unlawfulness of the conduct charged in the complaint.

The Shipping Act of 1916 contains a complete system for the regulation of the business of common carriers by water, which is entirely different from and inconsistent with the Sherman Act. It expressly prohibits certain conduct which it very definitely describes (Sections 14, 16, 17) (46 U. S. C. §§812, 815, 816). It vests in the administrative board which it creates (now the Federal Maritime Board) comprehensive powers for the enforcement of its provisions. The exercise of these powers in accordance with the purpose of the Act requires expert knowledge of the Shipping Industry.

Under section 15 of the Act (46 U. S. C. §814) the Board has not only the power but also the duty to approve agreements among competitors which but for the Shipping Act

would clearly violate the Sherman Act. Such approval is to be given if the Board finds that such agreements and the acts to be done thereunder comply with the standards prescribed by the Act.

The Board also has the power and the duty to refuse approval of agreements which it determines violate such standards or to cancel its previous approval. To perform an agreement of the kind mentioned in Section 15 of the Shipping Act without approval of the Board or after cancellation of such approval entails the severe penalty prescribed by the above mentioned section. Refusal to comply with an order of the Board or a violation of provisions of the Act is punishable by severe penalties.

The conduct charged in the complaint in this cause, if unlawful, is a violation not of the Sherman Act but of the Shipping Act. The question of whether such conduct is a violation of the Shipping Act is a question which in the first instance must be determined by the Federal Maritime Board in the exercise of the jurisdiction conferred upon it by the Act and in the light of its expert knowledge of all of the intricate technical facts and usages of such industry.

In *United States Navigation Co., Inc.* vs. *Cunard Steamship Co., Ltd., et al.*, 284 U. S. 474, the plaintiff brought suit to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Antitrust Act. The District Court granted a motion to dismiss the complaint (39 Fed. (2d) 204) on the ground that the matters complained of were within the exclusive primary jurisdiction of the United States Shipping Board under the Shipping Act of 1916, as amended by the Merchant Marine Act of 1920. The Circuit Court of Appeals affirmed (50 Fed. (2d) 83). This Court granted certiorari and affirmed.

The complaint in the *U. S. Navigation Co.* case alleged that the petitioner operated steamships for the carriage of general cargo between the port of New York and specified foreign ports; that the respondents carried 95% of the general cargo trade from Atlantic ports in the United States to the ports of Great Britain and Ireland; that the defendants and the petitioner were the only lines maintaining general cargo services in that trade; and that the respondents had entered into and were engaged in a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect of the carriage of general cargo from the United States to the foreign ports named, with the object and purpose of monopolizing such trade and commerce.

It was further alleged that the conspiracy involved the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agreed to confine their shipments to the lines of respondents and that the differentials thus created between the two rates were not predicated upon volume of traffic or frequency or regularity of shipment but were purely arbitrary and wholly disproportionate to service rates. The sole consideration was their effect as a coercive measure. Other means to accomplish the same end were alleged. This Court said at page 480:

> "It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently, furnishes ground for an injunction under §16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

At page 481 this Court said, with reference to the Interstate Commerce Act:

"• • • The rule had become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion."

At page 482 this Court said:

"• • • Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission 'is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate

appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.'"

At page 485 this Court with reference to the Shipping Act of 1916 said:

"The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *United States v. Hamburgh-American S.S. Line*, 216 Fed. 971."

Also at page 485:

"* * * The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named

act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

It was contended by the petitioner in *United States Navigation Co.* vs. *Cunard Steamship Co.* that the complaint alleged an agreement among the respondents that the Maritime Board had no power to approve and that therefore the motions to dismiss the complaint should not have been granted. As to such contention this Court said in part at page 487:

"* * * And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The *United States Navigation Co.* case is cited by this Court in *Swayne & Hoyt, Ltd.* vs. *United States*, 300 U. S. 297.

Swayne & Hoyt was a steamship corporation engaged in interstate, as distinguished from foreign, commerce. It

was operating under an agreement approved by the United States Shipping Board under Section 15 of the Shipping Act of 1916, 46 U. S. C. §814.

Pursuant to the provisions of the Intercoastal Shipping Act of 1933, 46 U. S. C. §§845 and 845a, which provisions do not affect carriers in foreign commerce, it filed a new tariff with the United States Shipping Board. This tariff provided for contract rates for specified commodities to be enjoyed by shippers who agreed with the Conference by written contract to make all their shipments of those commodities by vessel of the Conference members for a specified period. After an investigation Swayne & Hoyt were required by the Maritime Board to cease charging the higher rate to shippers who had not entered into the contract. On direct review this order was affirmed and the case came before this Court on appeal.

The important difference between the regulation of carriers engaged in foreign commerce and those engaged in intercoastal shipping was that the latter were required to file schedules of rates with the Maritime Board which were subject to change only on thirty days notice and to examination by the Board as to their lawfulness with power to suspend the rate pending investigation. Although the Maritime Board and its predecessors had approved contract non-contract rates in the foreign trade,[1] it regarded such rates as unnecessary in the Intercoastal trade.

In affirming the decision of the three-judge court, this Court said at page 303:

> "As pointed out by this Court in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, the provisions of the Shipping Act which confer upon the Shipping Board authority over rates and prac-

[1] Note; See Gulf Intercoastal Contract Rates, 1 U. S. Mar. Com. Rep. p. 524.

tices of carriers by water, and prescribe the mode of its exercise, closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. Both have set up an administrative agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders.

"Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, supra, 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic" (citing cases).

This Court further said at page 304:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

The *United States Navigation Co.* case, *supra*, was cited in *West India Fruit & Steamship Co., Inc., et al.* vs. *Sea-*

train Lines, Inc. (C. C. A. 2d 1948), 170 Fed. (2d) 775, petition for certiorari dismissed on petitioner's motion, 336 U. S. 908; *Wisconsin & Michigan Transportation Co.* vs. *Pere Marquette,* 67 Fed. (2d) 937. See also: *Isbrandtsen Co., Inc.* vs. *United States, et al.,* 81 Fed. Supp. 544, appeal dismissed without opinion 336 U. S. 941.

Swayne & Hoyt, Ltd. vs. *United States* was cited by this Court in *United States* vs. *Trucking Company,* 310 U. S. 344, 353.

The *United States Navigation Co.* case, *supra,* and the reasons upon which the decision is based are applicable to the case at bar.

The trial court attempted to distinguish the *United States Navigation Co.* case upon the ground that the plaintiff in that case was a common carrier by water, whereas, the plaintiff in the case at bar is the United States, relying solely upon the fact that this Court said in the *United States Navigation Co.* case that the remedy afforded by the Shipping Act was the only remedy to which the private litigant was entitled. The Shipping Act not only provides a civil remedy, it also provides severe penalties for violation of its provisions. See last paragraph of Section 15, 46 U. S. C. §814, the last paragraph of Section 16, 46 U. S. C. §815 and the last paragraph Section 21, 46 U. S. C. §820.

This attempted distinction entirely ignores the reasoning upon which the decision in the *United States Navigation Co.* case is based. This reasoning may be summarized as follows:

First, that the violation alleged in the complaint was a violation of the Shipping Act.

Second, that the Shipping Act is permissive as well as restrictive, and that it is the intent of the Act that the application of its standards should be applied by the Maritime

Board to the conduct of carriers and its lawfulness or unlawfulness determined by a body of experts having knowledge of the shipping industry not possessed by a Court.

Third, that the same principle which has for many years been applied to the construction and application of the Interstate Commerce Act in determining the exclusive primary jurisdiction of the Interstate Commerce Commission should be applied to the construction and application of the Shipping Act. It should be noted that this Court in the *United States Navigation Co.* case stated that the Maritime Board (then the Shipping Board) might, after investigation, find that the conduct of the respondents in that case was lawful no matter how unlawful it might appear to be on the face of the complaint.

This Court, therefore, refused to determine whether the conduct charged was lawful or unlawful until after the administrative body had made its investigation and reached its conclusion. It is impossible to believe that the lawfulness or unlawfulness of conduct may depend upon whether such conduct is challenged by a private litigant or by the United States. No case was cited either by the Government or in the opinion of the District Court which lends any support to such a view.

In *United States* vs. *Pacific and Arctic Co.*, 228 U. S. 87, steamship lines running from the United States to Alaska, a wharf company owning all of the wharves in Skagway, Alaska, and railroad companies, some of which were American companies having their rights of way in Alaska, and others of which were Canadian companies traversing Canadian territory, were indicted.

Counts one and two of the indictment charged that the defendants had engaged in a combination and conspiracy in restraint of trade and commerce to eliminate and destroy

competition in the business of transportation of freight and passengers between various ports in the United States and British Columbia and the several cities in the valley of the Yukon River and its tributaries.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight in violation of the Interstate Commerce Act.

Counts four and five were substantially the same as count three.

The District Court held that it was without jurisdiction to entertain or determine the questions involved in the first five counts until they had been submitted to and passed upon by the Interstate Commerce Commission. This Court reversed, holding that the District Court had jurisdiction over the conspiracy counts. It will be noted that at the time this case was decided the Shipping Act had not yet been enacted and that the Interstate Commerce Commission had no power or jurisdiction with respect to such a conspiracy because such power had not then been conferred by the Interstate Commerce Act and also because some of the parties to such conspiracy were not subject to the Interstate Commerce Act.

This Court, however, held that the District Court had no jurisdiction over the counts which charged unlawful and unjust discrimination in the transportation of passengers and freight in violation of the Interstate Commerce Act. The reasons stated by this Court for affirming the dismissal of counts 3, 4 and 5 are applicable to the case at bar.

On this point this Court said at page 107:

> "The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its require-

ments, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, supra. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

It is as true of the Shipping Act as of the Interstate Commerce Act that it is more regulatory and administrative than criminal and also that some of the requirements of the Shipping Act depend upon the exercise of the administrative power of the Maritime Board.

It is also true that the great problems which the Shipping Act was intended to solve and the great purposes it was intended to effect are of much greater importance than the facility which should be given to some particular remedy, civil or criminal.

It is interesting to note that this Court cited as supporting its conclusion *Texas & Pacific Ry. Co.* vs. *Abilene*

Cotton Oil Co., 204 U. S. 426, and *Baltimore & Ohio Railroad Co.* vs. *Pitcairn Coal Co.*, 215 U. S. 481, 492, both of which suits were instituted by private litigants. The citation of these cases indicates that this Court believed that with respect to determination of questions, committed by act of Congress to an administrative board, the rule is the same whether the action be instituted by the United States Government or by a private litigant.

This principle also appears from the cases which cite *United States* vs. *Pacific and Arctic Navigation Co.*

In the *Minnesota Rate Cases*, 230 U. S. 352, 419, this Court said with reference to the Interstate Commerce Act:

> "* * * The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

citing cases, all of which, except the *United States* vs. *Pacific and Arctic Co., supra*, were cases brought by private litigants.

In *Pennsylvania Railroad Company* vs. *Clark Brothers Coal Mining Company*, 238 U. S. 456, 469, this Court said:

> "* * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

citing among other cases *United States* vs. *Pacific and Arctic Co., supra.*

In *Great Northern Railway Company, et al.* vs. *Merchants Elevator Company,* 259 U. S. 285, at page 291, Justice Brandeis said:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contra-distinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

citing, among other cases, in a footnote *United States* vs. *Pacific and Arctic Ry. & Nav. Co.,* 228 U. S. 87.

In *Rochester Telephone Corp.* vs. *United States*, 307 U. S. 125, 139, Justice Frankfurter said:

> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

A footnote to the opinion in the *Rochester* case at page 139 cites many cases including *U. S. Navigation Co.* vs. *Cunard Steamship Co., supra.* See also: *Mitchell Coal and Coke Company* vs. *Pennsylvania Railroad Company*, 230 U. S. 247, 258.

These decisions and many others which might be cited amply support the principle that exclusive primary jurisdiction under statutes such as the Interstate Commerce Act and the Shipping Act depends not upon the question as to whether the litigant is the United States or a private individual but upon the character of the question to be determined and whether it is the intent of Congress that such questions should be determined by the administrative body.

The trial court cited: *Keogh* vs. *Chicago & Northwestern Railway Company et al.*, 260 U. S. 156; *United States* vs. *Borden Company*, 308 U. S. 188, *et seq.*; *Georgia* vs. *Pennsylvania Railroad Co., et al.*, 324 U. S. 439; *United States Alkali Export Association, Inc. et al.* vs. *United States*, 325 U. S. 196.

The cases cited afford no support to the decision reached by the trial court.

Keogh vs. *Chicago & Northwestern Railway Company et al., supra,* was decided in 1922. This Court said at page 161:

> "* * * But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under §3, by injunction under §4, and by forfeiture under §6. That was settled by *United States* vs. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* vs. *Joint Traffic Act Association,* 171 U. S. 505."

The Interstate Commerce Act at the time this decision was rendered contained no provision vesting in the Interstate Commerce Commission any power over a combination among competing railroad companies to fix rates.

Under Section 15 of the Shipping Act on the contrary the Maritime Board has the power to approve and by its approval to render lawful an agreement among competing ship lines to fix rates.

United States vs. *Borden Co., supra.,* arose on indictment found against distributors of milk, the Associated Milk Dealers, Inc., a trade association of milk distributors, the Milk Dealers Bottle Exchange, the Pure Milk Association, a cooperative association of milk producers, the Milk Wagon Drivers Union, municipal officers of the City of Chicago and two persons who arbitrated a dispute between the major distributors and the Pure Milk Association.

The indictment charged a conspiracy to arbitrarily maintain and control artificial and non-competitive prices for fluid milk and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce. In an attack upon the indictment it was claimed that the production and marketing of agricultural products, including milk, had been removed from the purview of the Sher-

man Act by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §608b, also on the ground that the Pure Milk Association and its officers and agents were exempt from prosecution under the Sherman Act by reason of the Capper-Volstead Act, 7 U. S. C. §§291, 292.

This Court sustained the indictment on grounds not applicable to the case at bar. The defendants who were charged with the conspiracy included persons and organizations not within the provisions of either of the Acts above mentioned and such of the defendants as were within the provisions of the Agricultural Marketing Agreement Act had failed to comply with its provisions. Furthermore, the Agricultural Marketing Agreement Act, unlike the Shipping Act, is a limited statute with specific reference to certain particular transactions, while the Shipping Act contains a method for the complete regulation of the Shipping Industry and prescribes penalties for its violation.

The decision of this Court in *Georgia* vs. *Pennsylvania Railroad Co., et al.*, 324 U. S. 439, was based upon the fact that the combination to fix rates charged in that case was not a matter over which the Interstate Commerce Commission had jurisdiction.

At page 455 this Court said:

> "The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction. And an injunction designed to put an end to the conspiracy need not enjoin operation under established rates as

would have been the case had an injunction issued in Central Tranfer Co. v. Terminal R. Assn., supra."

At page 456 this Court said:

"* * * But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act."

Subsequent to the decision in *Georgia* vs. *Pennsylvania Railroad Co., supra,* the Reed-Bulwinkle Act, 49 U. S. C. §5(b) (June 17, 1948), was enacted. This Act conferred power upon the Interstate Commerce Commission to approve agreements among competing carriers fixing rates and exempting the carriers who had received such approval from the provisions of the Sherman Act.

This power is similar to the power which was conferred upon the Maritime Board by Section 15 of the Shipping Act of 1916.

United States Alkali Export Association, Inc., et al. vs. *United States,* 325 U. S. 196, was instituted to restrain alleged violations of the Sherman Act. Motion was made to dismiss the complaint on the ground that, as claimed, exclusive jurisdiction of the matters charged therein was vested in the first instance in the Federal Trade Commission under Sections 1, 2 and 5 of the Webb-Pomerene Act, 15 U. S. C. §61, 62 and 65. This Court affirmed the trial court's denial of the motion. The decision of this Court was based on two grounds: (1) that the Webb-Pomerene Act did not

vest in the Federal Trade Commission the power to adjudicate any controversies, and (2) that the acts charged were not violations of the Webb-Pomerene Act but of the Sherman Act.

At page 206 this Court said:

> "In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations." See also page 208.

II.

The approval by the Shipping Board and the Maritime Commission of the defendants' Conference Agreement and amendments thereof exempts the defendants from prosecution under the Sherman Act with respect to conduct charged in the complaint.

As above stated, the complaint alleges that the defendants' Conference Agreement and its amendments have been approved under Section 15 of the Shipping Act (R. 11, Note 5).

Section 15 of the Shipping Act (appendix p. 2a) requires every common carrier by water, or other person subject to this Act to file with the commission a true copy of every agreement with another such carrier or other person subject to the Act, or modification or cancellation thereof, to

which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in the section is given as including understandings, conferences, and other arrangements.

The Section provides that the Commission may by order disapprove, cancel or modify any agreement or any modification or cancellation thereof whether or not previously approved by it that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be in violation of such Act and requires that the Commission shall approve all other agreements, modifications or cancellations.

The Section further provides that every agreement, modification or cancellation, lawful under such Section, shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, U. S. Code (the Sherman Act) and amendments and acts supplementary thereto.

The attention of the Court is called to the fact that the Commission not only has the power but is required to approve agreements "controlling, regulating, preventing or destroying competition", if it determines that such agreements are in accord with the standards fixed by the Act for such approval.

The defendants' Conference Agreement (Exhibit A to complaint R. 10, par. 8) authorizes the parties thereto to pass upon any matter involving discriminations, tariffs, freights, brokerages or other charges or the regulation of transportation between the ports served by the members of the Conference.

Paragraph 9 of such Agreement (R. 11) authorizes the Conference to establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the Agreement, and all of the parties to such Agreement agree that they will be bound by the affirmative vote of the majority of their number upon such matters with the same force and effect as if expressly made a part of the Agreement.

The establishment under this Agreement of the "contract, non-contract" rates to which the plaintiff objects was merely the fixing of rates pursuant to paragraph 9 of the Agreement. It is not alleged in the complaint and it is not, in fact, true that these rates involved any discrimination among shippers for every shipper had the option either to sign an exclusive patronage agreement and ship at the lower rate or to refuse to sign such an agreement and pay the higher rate.

It is clear from the reports of the Maritime Board that that Board considered the "contract non-contract" rates merely as rates fixed by the Conferences pursuant to the provision of the Conference Agreements authorizing the fixing of rates by agreement.

In 1935 the United States Shipping Board which was then charged with the enforcement of the Shipping Act conducted an investigation under Section 19 of the Merchant Marine Act of 1920. The report of this investigation appears at 1 U. S. M. C. 470 *et seq.*

In the course of the investigation the Board considered the rates of the Far East Conference. Pages 479 and 480 of the report contain schedules of rates of the Far East Conference as compared with the rates of a competing line, designated as Table II and Table III. These rates are designated as conference contract rates.

At page 480 the Board said:

> "It will be noted that in Tables II and III the rates of the conference are headed 'contract' rates. Prior to the collapse of the Far East Conference in 1931, it had been the practice of the conference to give on some commodities reduced or 'contract' rates to all shippers, large or small, who agreed to give all their business for a period of one year to the conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the conference revived this contract rate system and extended it to practically all commodities."

This report shows two things:

1. that the Shipping Board regarded the establishment of contract rates merely as an establishment of rates pursuant to the conference agreement of the Far East Conference.

2. that it regarded such establishment as entirely lawful.

In the recent report of the Federal Maritime Board in *Isbrandtsen Co., Inc.* vs. *North Atlantic Continental Rate Conference, et al.*, 3 F. M. B. 235; the Board, after a discussion of the contract rate system, and of decisions of its predecessors with reference thereto, said at page 241:

> "Based on the interpretation above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide either specifi-

cally or inferentially for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system."

It will be noted that the Board in the above recited quotation referred to the approval of conference agreements which provided either *specifically or inferentially* for the dual rate system. The agreements which provided inferentially for the dual rate systems were undoubtedly the agreements which, like the Far East Conference agreement, authorized the members thereof to agree upon rates.

It thus appears that for many years the predecessors of the Federal Martime Board have construed Section 15 of the Shipping Act not only as authorizing Conference agreements providing for agreement upon rates but also that such Conference agreements authorized agreement upon "contract non-contract" rates whether or not such "contract non-contract" rates were specifically mentioned in such agreements. The Shipping Act has been amended on numerous occasions since 1931. In fact, Section 15 was amended in 1936. The Congress, therefore, may be regarded as adopting the construction and application of the Act made by the administrative agency. All departments of the Government, until recently, have also acquiesced therein. If there were any ambiguity in the Act and we think there is none, the construction placed upon it by the successive administrative agencies would be deemed to express the intent of the Congress since in this respect no material change has been made in the Act.

See: *United States* vs. *Cerecedo Hermanos Y Compania*, 209 U. S. 337; *New Haven R. R.* vs. *Interstate Commerce Commission*, 200 U. S. 361; *National Lead Company* vs. *United States*, 252 U. S. 140; *Massachusetts Mutual Life*

Insurance Co. vs. *United States*, 288 U. S. 269; *Logan* vs. *Davis*, 233 U. S. 613; *Interstate Commerce Commission* vs. *Parker*, 326 U. S. 60, rehearing denied 326 U. S. 803.

The approval of the defendants' Conference Agreement authorizing the defendants to agree upon rates authorized them to agree upon the dual rate system. By virtue of such approval their conduct was rendered lawful. The approval by the Board is, of course, subject to direct review but is not subject to collateral attack. While the approval remains in effect, the defendants, as members of the Conference, are expressly exempted from the provisions of the Antitrust Act with respect to the dual rate system.

The Maritime Board, after the approval of a Conference Agreement, does not lose control of what is done under it.

The Board has authority under Section 21 of the Act, as amended (48 U. S. C. §820), to require any common carrier by water to file with it any periodic or special report or any account, record, rate or charge or any memorandum of facts or transactions appertaining to the business of such carrier or other persons subject to the Act. A penalty is provided for failure to file such report and a much larger penalty for filing a false report. On its own motion, without complaint, it may investigate any violation of the Act and is required, when complaint is filed with it, to make such investigation and to make such report as it deems proper.

If the members of a conference agreement are engaging in any conduct which in the judgment of the Maritime Board is contrary to the standards provided in Section 15 of the Act, it is its duty to cancel its approval of the conference contract unless such conduct is forthwith discontinued. If the members of the Conference continue to

operate under the contract after its cancellation, each member is subject to a penalty of $1,000 a day.

The petitioners in the case at bar with respect to their motion are in a much stronger position than the defendants in the *United States Navigation Co.* vs. *Cunard Steamship Co., supra.* In that case the complaint, unlike the complaint in the case at bar, did not allege that the agreement made by the defendants fixing rates had been filed with or approved by the Shipping Board.

In the opinion in the *United States Navigation Co.* case this Court, after referring to the provisions of Section 15 of the Shipping Act, said at page 486:

> "* * * If there be a failure to file an agreement as required by §15, the board, as in the case of other violations of the act, is fully authorized by §22, *supra,* to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under §31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission."

At page 487 this Court said:

> "* * * In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and 'disapprove, cancel, or modify' it, because of a failure of the contracting parties to file it as §15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of §22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper."

III.

The History of the Shipping Act and the Debates in the House of Representatives and Senate while it was under consideration strongly support the Petitioner's position.

The Shipping Act of 1916 was enacted after a very thorough and able investigation of the Shipping Industry by the Committee on Merchant Marine and Fisheries of the House of Representatives, of which Congressman J. W. Alexander was Chairman. See House Resolution 587, 62nd Congress, Second Session.

The report of the Committee (Document 805—63rd Cong., Second Session) contains an exhaustive description of the Shipping Industry. Chapter 10 of the Report (page 281, *et seq.*), contains a summary of the methods of control adopted pursuant to shipping conferences and agreements and recommendations for proposed legislation.

> "The foregoing chapters contain a description of 80 steamship agreements and conference arrangements, which, when considered collectively, show that as regards nearly every foreign trade route practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings. The few instances where two or more lines serve the same route and have denied the existence of written or oral agreements for the regulation of the trade, are exceptions and not the rule.
>
> "An examination of the numerous aforementioned agreements and conference arrangements shows that they differ greatly in their details, especially since most of them are adapted to meet the needs of the

particular trades to which they apply; or the special requirements of the several lines which are parties to the arrangements. Aside from these differences of detail, however, all the agreements and arrangements show one unmistakable purpose, viz., the control of (1) competition between the lines which are parties to the agreement or conference, and (2) competition from lines which are outside of the conference."

It will be noted that the agreements considered by the Committee had two purposes:

1. the control of competition among the lines which were parties to the agreement or conference, and

2. the control of competition from lines which were outside of the conference.

At page 287 the report deals with the methods employed by the conferences to control competition from lines outside of the Conference. One method employed was the deferred rebate system which was condemned by the Committee and prohibited by the first paragraph of Section 14 of the Act, 46 U. S. C. §812. The term "Deferred rebate" is very carefully defined in this paragraph, as a rebate, the payment of which is deferred beyond the completion of the service for which it is paid and is made only if during both the period for which the rebate was computed and the period for deferment, the shipper has complied with the terms of the deferred rebate arrangement. The Committee also condemned the use of fighting ships which is also prohibited by the second paragraph of Section 14 of the Shipping Act.

Another method of controlling competition which was reported by the Committee consists of "contract non-contract" rates which are described as follows at page 290 of the Report:

"Such contracts are made for the account of all the lines in this agreement, each carrying its propor-

> tion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms."

This method of competition was not condemned by the Committee.

On page 295 to 303, inclusive, the Committee discusses the advantages of shipping conferences and agreements in the American foreign trade. At page 304 to 307 the disadvantages of such conferences are discussed.

In the chapter devoted to the recommendations of the Committee with respect to the regulation of water carriers engaged in the foreign trade, at page 415 *et seq.*, the Committee said:

> "* * * Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses."

The Committee after referring to its enumeration of the advantages of the conference system said at page 416 and page 417:

> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate

and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

Seven recommendations made by the Committee for the government of steamship carriers in the foreign trade of the United States appear on pages 419 to 421 of the report. The second and third recommendations are as follows:

"(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements

hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

"(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal on the part of any carrier to properly adjust the rates between classes of commodities."

The fourth recommendation was that rebating of freight rates be prohibited.

The fifth related to the investigatory powers to be given to the Interstate Commerce Commission. The sixth was that the use of fighting ships and deferred rebates be pro-

hibited and the seventh that adequate penalties be provided.

The bill introduced followed most but not all of the above mentioned recommendations of the Committee. During the debate in the House of Representatives, Mr. Alexander, Chairman of the Committee, after referring to the Committee's report said in part:

> "* * * As a result of our investigation we were confronted with the question whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these combinations be broken up, and if that law was not ample or broad enough in its provisions to do so that the law should be amended.
>
> "After giving thorough consideration to this grave question and after taking into consideration the arguments made before our committee by the ablest representatives of the foreign lines as well as of the domestic lines, we concluded that many of the provisions of the agreements under which combinations were operating were not objectionable; and hence we recommended reasonable regulation rather than that the combinations might be broken up. That decision was influenced by the consideration that if we would break up these combinations and restore destructive competition it would ultimately lead to consolidation and monopoly. Hence, after giving the question thorough consideration, we recommended that our water-bourne commerce, domestic and foreign, should either be brought under the supervision of the Interstate Commerce Commission or under some other body having jurisdiction: * * *" (Congressional Record 64th Congress, First Session, page 8077.)

Mr. Burke, who was a member of the Committee, said in part:

"In the shipping bill now under debate there are two primary objects. The first primary purpose is the formation of a naval auxiliary reserve, and the second principal object of the bill is to vest in a board created by the bill proper and plenary authority and power to control, regulate, and supervise the American merchant marine in its business relations with shippers and competing lines. This power of regulation, control, and supervision is to be also exercised over the foreign merchant marine when within American ports, the general purposes of these powers being intended for the protection of shippers and competing lines from the various unfair practices now and heretofore characteristic of both American and foreign water carriers, and to incidentally build up and develop American commerce and transportation with such ports and countries as present the most advantageous opportunities" (Id., page 8099).

After mentioning deferred rebates, fighting ships, retaliation and the making of unjust and discriminatory contracts relative to space accommodations, and with respect to loading and handling of freight in proper condition, and with respect to adjustment and settlement of claims, Mr. Burke said:

"Your committee at the conclusion of such hearings and after consideration and due deliberation made its report to Congress upon the subject with many valuable recommendations. Among the recommendations made in such report to Congress were that laws should be passed prohibiting the grossest and most vicious of such unfair practices, and also recommending that laws be passed extending the jurisdiction of the Interstate Commerce Commission to regulate and control the rates for transportation by water carrier along the same lines and for the same purposes that jurisdiction has for many years been

conferred upon such commission in the regulation, control, and supervisions of railway rates. * * *

"The said shipping investigation disclosed conclusively that it was absolutely necessary that there should be a body of laws enacted relating to the regulation and control of the merchant marine and that a board should be created and empowered with authority to enforce laws that might be passed relating to the same, and to also investigate, regulate, and control both the domestic and foreign merchant marine service" (p. 8095).

It is worth noting that both in the House and the Senate opposition was expressed to the clause excepting approved agreements from the Sherman Law.

In the House Representative Mann, then the Republican Floor Leader, offered an amendment striking the clause excepting the enumerated agreements from the Sherman Law. The amendment came to a vote and was defeated by a vote of 209 to 161, 12 answering present and 52 members not voting (Cong. Rec. 64th Cong. 1st Sess. p. 8354).

Again, when the bill was pending before the Senate this exemption clause was vigorously attacked in debate by Senator Jones, a member of the Committee, and by Senator Cummins of Iowa. Senator Cummins offered the following amendment:

"Mr. President, I move to strike from Sec. 16 as follows: Beginning in line 18 on page 17, down to and including 3 on page 18. A single word of explanation. This is the part of the bill which repeals the antitrust law. On it I ask for the yeas and nays" (Cong. Rec. 64th Cong. 1st Sess. p. 12815).

The yeas and nays were ordered, the result was announced: yeas 23, nays 37, so Mr. Cummins' amendment was rejected.

It may be that these circumstances add nothing to the force of the bill itself. They only show that the question was not passed without due consideration by both Houses.

Conclusion.

We respectfully submit that the judgment of the District Court should be reversed, first, because the Shipping Act confers exclusive primary jurisdiction upon the Maritime Board to determine the lawfulness or unlawfulness of the acts charged in the complaint. The decision of the Federal Maritime Board is subject only to direct review by the Courts. Second, because the defendants' Conference Agreement, which authorizes the members thereof to fix rates by agreement, authorizes the agreement to fix "contract non-contract" rates and the conduct of the defendants in fixing such rates is expressly excepted from the provisions of the Sherman Antitrust laws.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of the Shipping Act of 1916 and the Sherman Act.

"§14. Determination by commission as to violations

"The commission upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

"(1) Has violated any provision of section 812 of this title, or

"(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

"If the commission determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the commission shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated." September 7, 1916, Chapter 451, Section 14a, as added June 5, 1920, Chapter 250, 41 Stat. 996, amended June 29, 1936, Chapter 258, 49 Stat. 1987, 46 U. S. C. 813.

"§15. Contracts between carriers filed with commission

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action." September 7, 1916, Chapter 451, 39 Stat. 733, amended June 29, 1936, Chapter 858, 49 Stat. 1987. 46 U. S. C. 814.

"§16. Discriminatory acts prohibited

"It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent

thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense." September 7, 1916, Chapter 451, 39 Stat. 734; amended June 16, 1936, Chapter 581, 49 Stat. 1518, 46 U. S. C. 815.

"§17. Discriminatory rates prohibited; supervision by commission

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." September 7, 1916, Chapter 451, 39 Stat. 734; amended June 29, 1936, Chapter 858, §§204, 904, 49 Stat. 1987, 2016, 46 U. S. C. 816.

"§21. Reports by carriers required

"The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof,

to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

"Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment." September 7, 1916, Chapter 451, Section 21, June 29, 1936, Chapter 858, §§204, 904, 49 Stat. 1987, 2016; 46 U. S. C. 820.

Sherman Act.

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public

policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. 1.

"§2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. 2.

"§4. Jurisdiction of courts; duty of district attorneys; procedure

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney

General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U. S. C. 4.